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## Final Regulation Agency Background Document

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| <b>Agency name</b>                                 | Department of Agriculture and Consumer Services (Commissioner of)  |
| <b>Virginia Administrative Code (VAC) citation</b> | 2 VAC 5-20   |
| <b>Regulation title</b>                            | Standards for Classification of Real Estate as Devoted to Agricultural Use and to Horticultural Use under the Virginia Land Use Assessment Law |
| <b>Action title</b>                                | Amend  |
| <b>Document preparation date</b>                   | November 17, 2004  |

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 21 (2002) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

### Brief summary

*Please provide a brief summary (no more than 2 short paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.*

The existing regulation establishes standards that are used to determine whether or not real estate is devoted to agricultural or horticultural purposes. Included in the regulation is a requirement (subject to certain exceptions ) that real estate have a history of five consecutive years' previous use for agricultural or horticultural purposes before it may qualify for the lower tax rates

associated with agricultural or horticultural use. The present regulatory action is for the purpose of implementing legislation affecting the regulation. That legislation authorizes localities, in the case of crops that require more than two years from initial planting to commercially feasible harvesting, to waive the regulation's required history of previous use. The legislation also requires the Commissioner of Agriculture and Consumer Services to adopt implementing regulations.

The regulatory action amends provisions of the regulation with relation to aquaculture. The regulatory action is also for the purpose of clarifying and correcting the regulation.

### Statement of final agency action

*Please provide a statement of the final action taken by the agency including (1) the date the action was taken, (2) the name of the agency taking the action, and (3) the title of the regulation.*

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On November 17, 2004, the Commissioner of Agriculture and Consumer Services adopted as a final regulation, amendments to Standards for Classification of Real Estate as Devoted to Agricultural Use and to Horticultural Use under the Virginia Land Use Assessment Law.

### Legal basis

*Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter numbers, if applicable, and (2) promulgating entity, i.e., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.*

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The statutory authority for this proposed regulation is Section 58.1-3230 of the Code of Virginia, as well as Chapter 705 of the Acts of Assembly for 2001.

Specifically, the amendments to the regulation are in part for the purpose of implementing Chapter 705 of the Acts of Assembly for 2001. Under that act, localities are authorized to waive, with respect to real estate devoted to the production of crops that require more than two years from initial planting until commercially feasible harvesting, any requirement contained in the regulation that requires the real estate to have been used for a particular purpose for a minimum length of time before qualifying as real estate devoted to agricultural use or horticultural use. Chapter 705, in clause 2 (clause 2 not being set out in the Code of Virginia) goes on to require the Commissioner to adopt "all reasonable and necessary regulations to carry out the provisions of this act."

Specifically, the legislation necessitating a proposed substantive amendment to the regulation is written conditionally. It states (in language of the act amending Section 58.1-3231 of the Code):

"**If** the uniform standards prescribed by the Commissioner of Agriculture and Consumer Services pursuant to Section 58.1-3230 require real estate to have been used for a particular purpose for a minimum length of time before qualifying as real estate devoted to agricultural use or horticultural use, then such ordinance may waive such prior use requirement for real estate devoted to the production of agricultural and horticultural crops that require more than two years from initial planting until commercially feasible harvesting." [emphasis added]

Some of the amendments to the regulation are by way of acknowledgement of and in response to the "if" contained in the statute, acknowledgement that there is indeed a provision in the regulation requiring that the real estate have been used for a particular purpose for a minimum length of time before qualifying as real estate devoted to agricultural use or horticultural use.

The statutory authority contained in Chapter 705 is mandatory. The remaining amendments contained in the regulation are based upon permissive statutory authority, although sound regulatory policy (such as clarity of writing) argue for their adoption.

The regulation has also been amended with regard to aquaculture.

The web site address for the cited codified legal authority is: <http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+TOC5801000>. The substance of the second enactment clause is recited and largely quoted earlier in this "Basis" section of the Agency Background Document.

The Office of the Attorney General has certified that the agency has the statutory authority to promulgate the final regulation and that it comports with applicable state and/or federal laws.

## Purpose

*Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Detail the specific reasons it is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.*

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The purpose of the proposed action is to make amendments to the regulation to ensure its effectiveness and continued need, including amending the regulation to satisfy the statutory

amendment made by Chapter 705 of the 2001 Acts of Assembly, discussed under the "Basis" section of this report, above and including other matters discussed in this report.

The agency makes the following comment about the proposal's effect on the public's health, safety, and welfare: The proposed regulation is based on a statute that has as its purpose the offer (in certain circumstances) of an incentive to devote real estate to agricultural and horticultural purposes. Food, a result of agriculture and horticulture, is essential to public health. The production and sale of food in enterprise is essential to public welfare.

### Substance

*Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. A more detailed discussion is required under the "All changes made in this regulatory action" section.*

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The substance of the amendment is to make provision in regulation for a requirement of law, namely that the Commissioner of Agriculture and Consumer Services adopt a regulation governing localities' waiving the provision of the regulation requiring that real estate have been used for a certain purpose for a specified period of time in order to qualify for agricultural or horticultural use.

Also, since this regulatory action commenced, a substantive change has been made to the regulation regarding production with relation to aquaculture (see "Changes made since the proposed stage," below).

## Issues

*Please identify the issues associated with the proposed regulatory action, including:*

- 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*
  - 2) the primary advantages and disadvantages to the agency or the Commonwealth; and*
  - 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, please indicate.*
- 

Much of the substance of this regulation is required by statute, a matter over which the agency has no control. Hence the discussion below is largely a discussion of the merits of statute:

There are no known disadvantages associated with the proposal.

The advantages to the public and the Commonwealth include those enunciated in the "Declaration of Policy" contained in Section 58.1-3229 of the Code of Virginia. Also, more specifically, the proposal may have the beneficial effect of encouraging people to develop farms for the production of crops that, because they are borne on trees or vines which must first develop, take a long time between planting and commercially feasible harvesting. Such crops would include grapes and at least certain tree-grown fruits.

Certain agricultural and horticultural real estate may reap the benefits of the short-term tax benefits associated with the legislation requiring this amended regulation. This may mean an earlier reduction in taxes for real estate devoted to the purposes specified in the legislation in localities that afford a different tax status to agricultural and horticultural real estate, but localities do not have to participate in such a program affording a different tax status to such real estate. On the other hand, a reduced tax may have the effect of encouraging the production of

crops (such as grapes) that are associated with value-added products (such as wine), which may lead to additional tax revenues.

Also, the statutory amendment made by Acts 2003, c 356 has caused the agency to examine the regulation with respect to aquaculture and to make amendments that will remove certain restrictions on what constitutes aquaculture and qualification thereunder, a potential benefit to those who qualify.

**Changes made since the proposed stage**

*Please describe all changes made to the text of the proposed regulation since the publication of the proposed stage. For the Registrar’s office, please put an asterisk next to any substantive changes.*

| Section number | Requirement at proposed stage | What has changed | Rationale for change |
|----------------|-------------------------------|------------------|----------------------|
|                |                               |                  |                      |

\*1. Note, since this regulatory action began, the General Assembly has again amended the law governing land-use taxation (see Acts 2003, c. 356), essentially by defining aquaculture for purposes of establishing required minimum acreage of the real estate that is subject to agricultural-use taxation (see Section 58.1-3233(2)). The regulation contains two different statements about aquaculture in the provision relating to the management and production of the real estate (2 VAC 5-20-30(B)). They are:

". . .aquaculture production shall be primarily for commercial sale of. . . aquaculture products."

and

"Aquaculture production shall be primarily for commercial sale of freshwater fish and shellfish under controlled conditions for food."

The agency proposes to repeal this latter-quoted passage. To have two different statements in the same passage on the same subject may only complicate matters. Furthermore, the preference afforded to freshwater fish and shellfish by the regulation is, for purposes of the business of aquaculture, increasingly outmoded--the cultivation of marine, estuarine, and brackish creatures is growing. And in light of the formal incorporation of a statutory definition of "aquaculture" into the tax laws that does not afford preferences to freshwater fish and shellfish, this action would seem appropriate.

2. Also, in 2 VAC 5-20-30(B) the agency has corrected the text to reflect what is meant to occur under Section 30, namely that it is a qualifying use that is to be certified to. To say that bees are a qualifying use under Section 20, only to find that one cannot certify to that use under Section 30, would make no sense.

3. Also, the agency has decided to make minor amendments in Section 2 VAC 5-20-30(A)(1) and (2):

In subdivision 1, it has reworded the passage for simplicity's and clarity's sake, particularly for the purpose of making clear that, for example, one does not have to use best management practices that are inappropriate to the kind of agriculture or horticulture practiced.

In subdivision 2, it has reworded the passage for simplicity's and clarity's sake, particularly for the purpose of making clear that one does not have to apply nutrients to the soil if the soil is not devoted to the production of a commodity (as may be the case in producing fish or bees).

4 . The agency has revised the first sentence of Section 40(A), which, without the revision, provides for certification already provided for in Section 30. This first sentence of Section 40(A) is intended to deal with documentation of one's certification, and the text has accordingly been amended.

5. In Section 20 of the regulation at the proposed stage, the agency created a new provision entitled "Exceptions to the five-year-history-of-previous-use requirement." This provision was based in part on exceptions present in the existing regulation and in part on language based on the statute authorizing exemption relating to crops that require more than two years from initial planting until commercially feasible harvesting. The agency has decided in the final regulation to strike the new provision, restore the exemptions contained in the existing regulation, and create a separate exemption (at the end of the already-existing exemptions) relating to crops that require more than two years from initial planting until commercially feasible harvesting. (A change in a related passage in Section 40 was made, to reflect the revised citations caused by such a change in the exemptions language.) Doing this simplifies the exemptions.

In addition, in Section 20, the proposed regulation contained two proposed passages that would govern real estate participating in a governmental program that encourages the conservation of

the real estate, even if there is or was no commodity produced on the real estate. Based on advice of counsel, the agency has struck these two passages from the final regulation.

6. There have been minor changes regarding clarity and syntax, and the agency has updated the regulation to reflect the current name of a federal agency--the Natural Resources Conservation Service.

**Public comment**

*Please summarize all comments received during the public comment period following the publication of the proposed stage, and provide the agency response. If no comment was received, please so indicate.*

| <b>Commenter</b>                    | <b>Comment</b>  | <b>Agency response</b>   |
|-------------------------------------|-----------------|--|
| Rachel Morris, Virginia Farm Bureau | See text below. | The agency supports the view of the Virginia Farm Bureau that the waiver of the history of previous use authorized by the law can be beneficial to Virginia agriculture. |

*TO: Lawrence H. Redford, Regulatory Coordinator, VDACS*

*FROM: Rachel M. Morris, Legislative Specialist, Governmental Relations, VFBF*

*RE: Comments on 2 VAC 5-20-Standards for Classification of Real Estate as Devoted to Ag Use and to Horticultural use Under the Virginia Land Use Assessment Law (amending 2 VAC 5-20-10, 2 VAC 5-20-20, and 2 VAC 5-20-40)*

*Virginia Farm Bureau has been an advocate of Virginia's use value assessment program and continues to look for ways to improve farmers' profitability as well as looking for alternative taxing measures to alleviate the pressures of the real estate tax. The use value assessment program is an effective tool for localities to use in recognizing the*

*many contributions that agriculture gives to communities. Maintaining the viability of farming in the Commonwealth continues to become more challenging with continuously low commodity prices, a three to four year drought, implementation and adjustment to the 2002 Federal Farm Bill, just to name a few.*

*By amending the Code of Virginia Section 58.1-3230 to allow localities to waive the requirement of producing documentation stating prior use of five years for the production of agriculture or horticulture, this enforces the state's commitment to preserving agriculture. There is more of a need than ever to allow the farmers to be able to branch out into niche markets or transition into other more profitable endeavors. With the growing wine industry here in Virginia, this amendment provides incentives for new and beginning farmers as well as existing farmers to branch out into a new market ultimately creating more value-added products for Virginia's market. Additionally, other fruit growers will be inclined to begin an operation as well. Overall, this amendment creates more incentives and, in turn, brings more revenue to the Commonwealth as well as promotes agriculture in Virginia making our state and its farmers more competitive and profitable.*

*Thank you for the opportunity to comment. Please feel free to contact me with any questions or concerns.*

*Rachel M. Morris  
Legislative Specialist, Governmental Relations  
Virginia Farm Bureau Federation  
12580 West Creek Parkway  
P.O. Box 27552  
Richmond, VA 23261  
Office: (804) 290.1017  
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Fax: (804) 290.1099*

**All changes made in this regulatory action**

*Please detail all changes that are being proposed and the consequences of the proposed changes. Detail new provisions and/or all changes to existing sections.*

| Current section number | Proposed new section number, if | Current requirement | Proposed change and rationale |
|------------------------|---------------------------------|---------------------|-------------------------------|
|------------------------|---------------------------------|---------------------|-------------------------------|

|  |                   |  |  |
|--|-------------------|--|--|
|  | <b>applicable</b> |  |  |
|  |                   |  |  |

Within the regulation as a whole, there are various adjustments to numbering, lettering, and citation in the regulation, along with minor changes regarding clarity and syntax. In addition, the following changes have been made:

Section 10: The agency proposes to strike a statement of statutory authority contained in the first sentence of the regulation, for the struck section does not appear to contain explicit statutory authority for the regulation. Also, the agency proposes in Section 10 to clarify the regulation by striking a passage that purports to summarize existing statutory law. The agency believes that direct recourse to the statutes is the appropriate means of finding the law. Since no recitation of statutory authority remains in this section (the statutory authority being cited instead at the head of the proposed regulation), the agency proposes re-titling this section "Preamble," a title more in keeping with the remaining content of the section.

Section 20: In Section 20 the agency has added to the group of exceptions an exception relating to crops that require more than two years from initial planting until commercially feasible harvesting. This language reflects the statute governing the same.

Section 30: Note, since this regulatory action began, the General Assembly has again amended the law governing land-use taxation (see Acts 2003, c. 356), essentially by defining aquaculture for purposes of establishing required minimum acreage of the real estate that is subject to agricultural-use taxation (see Section 58.1-3233(2)). The regulation contains two different statements about aquaculture in the provision relating to the management and production of the

real estate (2 VAC 5-20-30(B)). They are:

" . . .aquaculture production shall be primarily for commercial sale of. . . aquaculture products."

and

"Aquaculture production shall be primarily for commercial sale of freshwater fish and shellfish under controlled conditions for food."

The agency proposes to repeal this latter-quoted passage. To have two different statements in the same passage on the same subject may only complicate matters. Furthermore, the preference afforded to freshwater fish and shellfish by the regulation is, for purposes of the business of aquaculture, increasingly outmoded--the cultivation of marine, estuarine, and brackish creatures is growing. And in light of the formal incorporation of a statutory definition of "aquaculture" into the tax laws that does not afford preferences to freshwater fish and shellfish, this action would seem appropriate.

Also, in 2 VAC 5-20-30(B) the agency has corrected the text to reflect what is meant to occur under Section 30, namely that it is a qualifying use that is to be certified to. To say that bees are a qualifying use under Section 20, only to find that one cannot certify to that use under Section 30, would make no sense.

Also, the agency has decided to make minor amendments in Section 2 VAC 5-20-30(A)(1) and (2):

In subdivision 1, it has reworded the passage for simplicity's and clarity's sake, particularly for the purpose of making clear that, for example, one does not have to use best management practices that are inappropriate to the kind of agriculture or horticulture practiced.

In subdivision 2, it has reworded the passage for simplicity's and clarity's sake, particularly for the purpose of making clear that one does not have to apply nutrients to the soil if the soil is not devoted to the production of a commodity (as may be the case in producing fish or bees).

Section 40: Section 40 governs the interpretation of the regulation. The regulation declares that in cases of uncertainty on the part of the Commissioner of the Revenue or local assessing officer, the law authorizes him to request an opinion from the Commissioner of Agriculture and Consumer Services as to whether a particular property meets the criteria contained in the regulation for agricultural or horticultural taxation. The regulation lists certain information that the Commissioner of the Revenue or local assessing officer must provide to the Commissioner of Agriculture and Consumer Services when requesting an interpretation (such as the total number of acres involved). The agency proposes to add to that list an item requiring that in any case involving a question involving the newly authorized exception to the five-year-history-of-previous-use requirement, the Commissioner of the Revenue or local assessing officer state whether the locality has waived the previous-use requirement.

In Section 40, the agency proposes striking a sentence that appears to authorize an action (specifically an appeal of the decision of the Commissioner of Agriculture and Consumer Services in a tax matter) that is provided for by statute. The agency believes that direct recourse to the statute is the best means of finding the law.

In Section 40 is a footnote relating to a conservation farm management plan prepared by a professional, which, according to the regulation, the Commissioner of the Revenue may find useful in making a determination that real estate is devoted to agriculture or horticulture. In explaining this provision, the footnote states that such a plan is required by the 1985 farm bill, an apparently inaccurate statement. The agency proposes striking the footnote.

Also in Section 40 is a footnote relating to the definition of "farm" used by the National Agricultural Statistics Service (NASS), a branch of the United States Department of Agriculture. In attempting to verify (and to the extent necessary update) the definition, the agency made several contacts with NASS' staff. According to one source, the definition is not codified in U. S. law. None of those contacted was able to identify any law or regulation in which the definition is codified. Consultation with staff of the American Farm Bureau Federation also led to their conclusion that the definition is not codified in law or regulation. In fact, consultation of two NASS Internet sites on the same day produced the following, differing definitions of "farm":

"A farm is defined as any place which produced and sold or normally would have produced or sold \$1,000 worth of agricultural products during the year."

"A farm is defined as 'any establishment from which \$1,000 or more of agricultural products were sold or would normally be sold during the year'."

In the absence of a verifiable, consistent, codified federal definition, the agency proposes striking the footnote.

In Section 40, the agency proposes to update the reference to "ASCS" (which stands for "Agricultural Stabilization and Conservation Service," an organization that has been re-named the "Farm Service Agency.")

The agency has revised the first sentence of Section 40(A), which, without the revision, provides for certification already provided for in Section 30. This first sentence of Section 40(A) is intended to deal with documentation of one's certification, and the text has accordingly been amended.

The agency has updated the regulation to reflect the current name of a federal agency--the Natural Resources Conservation Service.

### Family impact

*Please assess the impact of the proposed regulatory action on the institution of the family and family stability.*

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1. The substantive amendments relating to the waiver of the five-year history of production are required by statute, and so the discussion below is in effect an analysis of the impact of the statute:

A. By potentially decreasing the taxes paid by farm families who would benefit from the legislation requiring this regulation, this regulation may increase disposable family income.

B. The proposed regulation is thus expected, by increasing resources to those families, to: (1) strengthen the authority and rights of parents in the education, nurturing, and supervision of their children; (2) encourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; and (3) strengthen the marital commitment. The proposed regulation is also thus expected to have a positive effect on family formation, stability, and autonomy.

C. To the extent that the proposed regulation has an income-enhancing effect for families, it should have a positive effect, for purposes of Section 2.2-606 of the Code of Virginia, on family formation, stability, and autonomy.

2. The repeal of the second passage in the regulation on aquaculture production may have the effect of qualifying aquaculture operations that heretofore may not have qualified, and hence having the effects stated in paragraphs A, B, and C, above.

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